

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

Petition of Charter Communications, Inc.,)	MB Docket No. 18-283
On behalf of its subsidiaries and affiliates)	
)	CSR No. 8965-E
For a Determination of Effective)	
Competition in:)	PSID Nos. 003051
)	003621
Massachusetts Communities and)	007064
Kauai, Hawaii)	002573

To: Chief, Media Bureau

**OPPOSITION OF
THE STATE OF HAWAII**

The State of Hawaii (the “State”),¹ by its attorneys and pursuant to Section 76.7 of the Commission’s rules, hereby opposes the Petition for Determination of Effective Competition (“Petition”) of Charter Communications, Inc. (“Charter”) addressing the absence of competitive conditions on the island of Kauai.

Charter, through its subsidiary Oceanic Time Warner Cable, LLC, is the only cable television franchisee in the State providing cable television service to consumers on the island of Kauai. Charter’s Petition makes no attempt to claim that it faces real competition from other facilities-based providers of multichannel video programming distribution (“MVPD”) services in Kauai. Consumers in Kauai continue to have no choice in their selection of facilities-based programming services.

¹ These Comments are submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs (“DCCA”). The DCCA is the cable franchise authority for the State of Hawaii.

Instead, Charter's Petition relies on an interpretation of the effective competition language in the Communications Act of 1934, as amended (the "Communications Act") that was unintended by Congress and is facially unreasonable. Specifically, the Communications Act includes four tests for when effective competition for video programming services exists in a community. The first three tests focus on actual competitive conditions, *i.e.*, the percentage of households subscribing to the incumbent's cable television service as compared to the percent of households subscribing to the services of a competitor.² In each of these three tests, the threshold for finding effective competition is exceedingly low (in one test as low as 15 percent) and yet Charter makes no attempt to claim that such competitive conditions exist in Kauai.

Instead, Charter relies entirely on the fourth test, which focuses on whether a local exchange carrier ("LEC") or its affiliate is offering comparable video programming services directly to subscribers in the community.³ In adopting the LEC Test, Congress recognized that LECs control extensive telecommunications facilities and distribution networks and have access to poles and other rights of way, providing them with a unique ability to introduce competition for multichannel video programming services in the communities that they serve.

The LEC Test is therefore explicit in its application to LECs as *facilities-based* providers of video programming services. For example, the Communications Act states that the LEC Test applies to both LECs and any MVPD "using the *facilities* of such carrier or its affiliate."⁴

² See 47 U.S.C. § 543(l)(1)(A), (B) and (C). Finding that effective competition exists if: (A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of the incumbent, (B) at least two unaffiliated multichannel video programming distributors ("MVPDs") offer services to most of a community and the smaller provider serves at least 15 percent of the households, or (C) the franchising authority operates as an MVPD and serves at least 50 percent of the households.

³ See 47 U.S.C. § 543(l)(1)(D).

⁴ *Id.* (*emphasis added*).

The incumbent LEC in Hawaii is Hawaiian Telcom, Inc. (“Hawaiian Telcom”). Although Hawaiian Telcom is providing video programming services to consumers on Oahu, it has not expanded its video programming services to any other island in the State. Despite this fact, Charter argues that the LEC Test is satisfied and effective competition exists in Kauai because an online video distribution (“OVD”) service, DIRECTV Now, which is offered by DIRECTV LLC an affiliate of AT&T, is available to Kauai residents over the Internet.⁵

To reach this baseless conclusion, Charter relies on language in the LEC Test that states that it is applicable to LECs or their affiliates that “offer video programming services directly to subscribers *by any means* (other than direct-to-home satellite services) in the franchise area.”⁶ Charter claims that the phrase “by any means” should be interpreted to include OVD distribution using the Internet.⁷

Charter’s interpretation directly conflicts with the legislative history of the LEC Test, which Congress added to the definition of effective competition as a part of the Telecommunications Act of 1996 (“Telecommunications Act”). The Senate version of the Telecommunications Act specified that the LEC Test applied only to LECs that provide video programming services “either over a common carrier video platform or as a cable operator.”⁸

⁵ See *Charter Communications, Inc., Petition for Determination of Effective Competition*, CSR-8965-E (Sept. 14, 2018) (“Charter Petition”).

⁶ See 47 U.S.C. § 543(l)(1)(D) (*emphasis added*).

⁷ See Charter Petition at 4.

⁸ S.652 as passed by the Senate, June 15, 1995, § 203(b)(2) (104th Congress).

The House version of the Telecommunications Act was also limited to LECs that provide a “video dialtone service” or secure a franchise for a cable television system.⁹ In harmonizing these two versions of the LEC Test, the Conference Committee changed the language to “by any means” to cover other distribution technologies, all of which were facilities-based, explaining that “by any means” includes “MMDS, LMDS, an open video system, or a cable system.”¹⁰ This should not be misconstrued to include non-facilities-based OVD services.

Charter’s interpretation of the LEC Test also fails because OVD providers of video programming services do not provide their services *directly* to subscribers and such services are not *comparable* to the cable programming service of the incumbent.¹¹ Instead, as the Commission has recognized, OVD providers cannot reach consumers absent “sufficient Internet capacity to provide customers with a high-quality OVD viewing experience.”¹² This means that consumers on Kauai cannot subscribe to OVD programming unless they first subscribe to a “high-speed Internet access service”¹³ from a broadband Internet service provider (“ISP”) such as Charter, which is the largest wireline broadband ISP on Kauai.

⁹ S.652 as passed by the House of Representatives, with Amendments, October 12, 1995, § 202(h) (104th Congress).

¹⁰ Senate Report No. 104-230, Conference Report to accompany S. 652, at 170, February 1, 1996 (104th Congress).

¹¹ See 47 U.S.C. § 543(l)(1)(D) (“*emphasis added*”).

¹² *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 16-247, Eighteenth Report, DA 17-71, ¶ 143 (Chief, Media Bur. Jan. 17, 2017).

¹³ *Id.*, ¶ 148.

“Wireline ISPs typically charge consumers higher prices for higher Internet speeds.”¹⁴ Further, as has been reported to the Commission, entities such as Charter offering both cable television and Internet access services “may have incentives to use data allowances or exempt affiliated services from these data limits in order to benefit their co-owned MVPD service.”¹⁵ Therefore, ISPs such as Charter effectively serve as gating intermediaries between OVD providers and subscribers in Kauai. OVD services are therefore not *comparable* to cable television programming services and they are not available *directly* to subscribers in Kauai. Instead, Charter’s dominant role in the provision of broadband and video programming services in Kauai precludes a finding of effective competition by the Commission.

A finding by the Commission that effective competition does not yet exist in Kauai would not only be consistent with the statute and legislative intent, but it would also best serve the public interest. Regulation of rates for the basic cable service tier was established by Congress because of the absence of competition that exists in the provision of multichannel video programming services. Although true competition has since been introduced in many communities, some, such as Kauai, remain entirely dependent on a single facilities-based provider. Therefore, the public interest justifications that prompted Congress to adopt rate regulation for the basic programming tier still exist today in Kauai and the public interest would

¹⁴ *Id.*, ¶ 150.


¹⁵ *Id.*, ¶ 151.

therefore be served by leaving rate regulation in place until the effective competitive conditions in Kauai change for the better.

Based on the forgoing, Charter's Petition should be denied.

Respectfully submitted,

THE STATE OF HAWAII

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October 25, 2018

AFFIDAVIT

I, Ji Sook Kim, affirm the truth of the following representations based upon my personal knowledge:

1. I am the Cable Television Administrator of the Cable Television Division for the Department of Commerce and Consumer Affairs of the State of Hawaii.
2. I have read the foregoing Opposition to the Petition for Determination of Effective Competition. With respect to the Opposition, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact, is warranted by existing law, and is not interposed for any improper purpose.

I affirm under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 10th day of October 2018.


Ji Sook Kim

CERTIFICATE OF SERVICE

I, Bruce A. Olcott, hereby certify that copies of the foregoing Opposition to the Petition for Determination of Effective Competition were served this 25th day of October 2018, via first-class mail, postage prepaid thereon to the following:

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